

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL W. HICKS and U.S. POSTAL SERVICE,
POST OFFICE, Columbia, S.C.

*Docket No. 97-2022; Submitted on the Record;
Issued April 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim.

On June 28, 1996 appellant, then a 48-year-old letter carrier, filed a claim for compensation alleging that on June 27, 1996, while he was on his postal route, his navel was "popping out." The location of the incident was given as "on route." The time of the incident was not noted. In support of his claim, appellant submitted a July 1, 1996 form report from his attending physician, whose signature is illegible. In the report, the physician noted that appellant was first seen on June 28, 1996, at which time he reported that he had been lifting when he noticed swelling around his navel. The physician diagnosed an umbilical hernia, indicated by checkmark that there was no history or evidence of concurrent or preexisting injury, disease or physical impairment and further indicated by checkmark that the condition was caused or aggravated by the employment activity described by appellant. Appellant was referred for surgical evaluation and was released to light duty, beginning June 28, 1996. Appellant underwent surgical repair of the hernia on July 18, 1996, and returned to full duty on August 26, 1996.

By letter dated September 9, 1996, a postal inspector notified the Office that several inconsistencies had come to light with respect to appellant's claim. First, the inspector noted that appellant had completed two separate claim forms relating to his hernia condition and listed two different locations and dates of injury on each form. Second, the inspector noted that appellant's supervisor had submitted a statement to the effect that appellant told him that his navel had popped out prior to the June 27, 1996 incident.

On September 28, 1996 the Office accepted appellant's claim for an umbilical hernia with approved surgical repair. The Office stated that it had considered the September 9, 1996 letter from the postal inspector but did not find the discrepancies listed to be a bar to appellant's

claim as the case record only contained one claim form, and as it had not been established that appellant had previously experienced an umbilical hernia.¹

The second Form CA-1, dated July 12, 1996 and completed by appellant at the request of the employing establishment, was submitted into the record. This claim form indicates the incident occurred on June 28, 1996, at 10:00 a.m., and lists the location of the incident as “1535 Platt Springs Road on route C-20.” Appellant described the incident as having occurred while “removing trays of flats from [the] parcel tub, loading trays of flats in [the] vehicle and on [the] street also.” He described the nature of his injury as “navel popped out the size of a golf ball, four times.”

An accident report generated following the incident was also submitted into the record. This form, completed on June 28, 1997, lists the incident as having occurred on June 27, 1996 at 11:00 a.m. and states that appellant “was servicing businesses on Knox Abbott Dr[ive] when [his] navel started popping out -- he said he had to keep pushing it back in.”

By letter dated October 10, 1996, the postal inspector responded to the Office’s acceptance of the claim and submitted a medical report from Dr. Kathleen P. Flint, one of appellant’s treating physicians. In her report dated February 28, 1996, Dr. Flint noted that appellant, who had presented himself for treatment of gout, was also noted to have an umbilical hernia, which appellant said “was post-traumatic after lifting something at work.” Dr. Flint further noted that “[i]t has been there for years but is starting to bother him some. It swells up about the size of a half dollar.” Dr. Flint gave appellant the names of several surgeons to see about his condition. Based on his indication that appellant’s hernia was a preexisting condition, the employing establishment requested additional medical evidence be developed to determine whether appellant’s hernia was in fact causally related to his employment.

By letter dated November 12, 1996, the Office requested that appellant submit additional factual and medical evidence. The Office specifically requested that appellant explain the factual inconsistencies contained in the record and submit additional medical evidence explaining why his hernia surgery was necessary at the time he had it.

In a decision dated January 8, 1997, the Office rescinded acceptance of appellant’s claim on the grounds that the fact of an injury was questionable. The Office specifically stated that, although there was conflicting evidence in the case record at the time of the acceptance of the claim, new evidence had been submitted that “lends greater doubt to the injury being sustained as alleged.” The Office explained that the medical report from Dr. Flint indicates that appellant’s hernia was preexisting and symptomatic approximately five months prior to the reported date of injury, that two differing accounts of the injury had been given and that appellant had not responded to the Office’s November 12, 1996 request for additional factual and medical evidence.

¹ The record indicates that both the second claim form described by the postal inspector and an accident report form further describing the incident were received into the record on July 31, 1996.

By letter dated March 9, 1997, appellant requested reconsideration of the Office's decision and submitted a narrative statement and additional medical evidence in support of his claim.

In his narrative statement, appellant acknowledged that Dr. Flint noticed his navel in February 1996, and asked him if it was causing him trouble. He stated that he informed her that it popped out sometimes and larger than before. With respect to the June 27, 1996 incident, appellant stated that during that day, while performing his duties as a letter carrier, his navel popped out the size and shape of a golf ball. He explained that this happened four separate times and was accompanied by pain and nausea. One episode was in the employing establishment at 1535 Platt Springs Road while loading flat trays in his parcel tub, a second time while loading and unloading flat trays from his parcel tub to his truck, a third time at 440 Knox Abbott Drive while unloading his cart from his truck, and a fourth time at 839 Indigo Avenue while unloading flat trays from the rear of the truck and placing them beside the driver's seat. He stated that he sought medical attention and soon afterwards underwent surgery because he could not continue his job as a letter carrier in his condition. With respect to the differing dates of injury reported, appellant explained that when he was asked to fill out a second CA-1 form, he mistakenly looked at the date the first form was signed, June 28, 1996, and not at the original date of injury, June 27, 1996. Appellant stated that this was an honest mistake and that he did not feel he had provided substantially different information on the various claim forms filed.

In further support of his request, appellant submitted a July 17, 1997 preoperative history report from his surgeon, Dr. Richard Felton, who noted that appellant had "noticed a bulge around his umbilicus recently." He added: "He says he has noticed this at least in the last several months and it has recently gotten tender. He says he has had a smaller defect present for possibly a longer period of time."

Finally, appellant submitted a summary report from Dr. Felton dated March 26, 1997, in which the physician stated:

"[Appellant] was first referred to me on July 8, 1996 with umbilical hernia. He apparently had this for some time but around the end of June 1996, during some heavy lifting, he noticed some significant pain associated with it and began becoming more painful and symptomatic, although the defect was probably present for some time. This is not unusual for a defect to be present for some time but then suddenly cause pain."

In a merit decision dated April 15, 1997, the Office found the evidence submitted insufficient to warrant modification of its prior decision.

The Board finds that the Office improperly rescinded its acceptance of appellant's claim.

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged

injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements in determining whether a *prima facie* case has been established. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.² However, once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In order to rescind prior acceptance of a claim, the Office must establish that its prior acceptance was erroneous through new or different evidence.³ This evidence must be substantial and probative positive evidence confirming the fact that the injury did not occur as appellant alleged.⁴ The Office does not meet its burden of proof to rescind by merely showing that its acceptance may have been erroneous.⁵ In the present case, appellant filed a claim stating that, while he was in the performance of duty, his navel popped out. The Office accepted that appellant's umbilical hernia and subsequent surgical repair was causally related to employment duties he performed on June 27, 1996. The Office therefore has the burden of justifying termination or modification of that acceptance by establishing that its original determination was erroneous.

The Office based its January 8, 1997 rescission of acceptance of appellant's claim in part on the fact that several factual inconsistencies had come to light, namely that the date and time of the injury listed on the two claim forms and on the accident report differed slightly, as did the location where the injury occurred. Closer inspection of these forms, however, does not reveal the type of inconsistencies which would cast serious doubt on appellant's claim. On his original Form CA-1, filed on June 28, 1996, appellant lists the date of injury as June 27, 1996, does not indicate the time of the incident and lists the location as simply "on route." The incident is described only as "navel popping out." The accident report, also completed on June 28, 1996, again lists June 27, 1996 as the date of the incident, lists the time of the incident as 11:00 a.m. and provides that appellant was "servicing businesses on Knox Abbott Dr[ive] when navel started popping out -- he said he had to keep pushing it back in." While the accident form does provide additional information about appellant's claim, none of the information contained therein conflicts in any way with appellant's original CA-1. The final Form CA-1 of record is that which appellant filled out, at the request of the employing establishment, on July 12, 1996. This claim form does contain information inconsistent with the original claim form in that it lists the incident as having occurred on June 28, 1996 at 10:00 a.m. However, the fact that this claim form was completed almost two weeks after the incident, and the fact that the prior CA-1 and the accident report, which were completed shortly after the incident, reflect the same date, lends credence to the conclusion that appellant committed a simple error when completing the second Form CA-1 and that the incident occurred on June 27, 1996 as originally alleged. With respect

² *Beatrice Meir*, 40 ECAB 1309 (1989).

³ *George E. Reilly*, 44 ECAB 458 (1993).

⁴ *See Beatrice Meir*, *supra* note 2.

⁵ *George E. Reilly*, *supra* note 3.

to the location of the incident, the Board notes that the accident report and the second claim form do list different street addresses. However, on the second claim form appellant clearly stated that on the day in question his navel “popped out” four separate times, which is consistent with more than one location being reported. Therefore, the Board does not find the new factual evidence sufficient to establish that on June 27, 1996 appellant’s navel did not “pop out” while he was performing his employment.

The Board also finds that the medical evidence relied on by the Office in rescinding its acceptance of appellant’s claim is insufficient to establish that his condition and the subsequent surgical repair was not causally related to his employment. The Office based its determination on the fact that the new medical evidence revealed that appellant’s umbilical hernia existed at least several months prior to the June 27, 1996 incident, as reported by Dr. Flint in her February 28, 1996 report. However, while this evidence lends support to a finding that appellant’s employment duties did not directly cause his umbilical hernia, it does not address whether appellant’s condition was aggravated and the need for immediate surgery was precipitated by appellant’s federal employment duties. Therefore, as the medical evidence relied on by the Office in its rescission of acceptance does not address whether appellant’s employment duties hastened the progression of his condition, materially affected appellant’s condition, or aggravated it in any way, it is insufficient to support the Office’s burden of proof.⁶

When, as in this instance, the Office has the burden of proof in showing that appellant’s disability was not sustained in the performance of duty, it is the Office’s burden to show how appellant’s disability was not a result of his employment-related responsibilities. The evidence relied on by the Office does not constitute substantial probative evidence sufficient to meet the Office’s burden of establishing that its original determination was erroneous and is not sufficient to justify termination or modification of compensation benefits. The Board, therefore, finds that the Office did not meet its burden of proof in rescinding its acceptance of appellant’s claim in its January 8, 1997 decision.

⁶ See *Rudy C. Sixta, Jr.*, 44 ECAB 727 (1993).

The decisions of the Office of Workers' Compensation Programs dated April 15 and January 8, 1997 are reversed.

Dated, Washington, D.C.
April 12, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member